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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
The Petition of the State of Minnesota,) CC Docket No. 98-1
Acting by and Through the Minnesota)
Department of Transportation and the)
Minnesota Department of)
Administration, for a Declaratory Ruling)
Regarding the Effect of Sections 253(a),)
(b) and (c) of the Telecommunications)
Act of 1996 on an Agreement to Install)
Fiber Optic Wholesale Transport)
Capacity in State Freeway Right-of-way)

Reply Comments of Crown Castle International Corp.

I. Introduction

Crown Castle International Corp. ("Crown Castle"), pursuant to Public Notice DA 98-32¹ and Order DA 98-537,² hereby files its Reply Comments on the State of Minnesota's petition to the Federal Communications Commission ("Commission") for a declaratory ruling regarding the effect of Sections 253(a), (b) and (c) of the

¹ "Commission Seeks Comment on Minnesota Petition for Declaratory Ruling Concerning Access to Freeway Rights-of-way Under Section 253 of the Telecommunications Act," CC Docket No. 98-1, *Public Notice*, DA 98-32 (rel. January 9, 1998) (establishing reply comment deadline of February 24, 1998).

² Petition of the State of Minnesota, Acting by and Through the Minnesota Department of Transportation and the Minnesota Department of Administration, for a Declaratory Ruling Regarding the Effect of Sections 253(a), (b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-way, CC Docket No. 98-1, *Order*, DA 98-537 (rel. March 19, 1998) (extending reply comment deadline to April 9, 1998).

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Telecommunications Act of 1996³ on an agreement to install fiber optic wholesale transport capacity in certain state freeway rights-of-way.⁴ Crown Castle reiterates its support of the position of the State of Minnesota (the “State”) that its agreement with ICS/UCN LLC and Stone & Webster (the “Agreement,” and collectively, the “Developer”) is consistent with Section 253(a), (b) and (c) of the Telecommunications Act.

However, to the extent that the Commission determines that the Agreement is in any part or degree inconsistent with Section 253(a), (b) or (c), Crown Castle urges the Commission to adhere closely to the requirement of Section 253(d), that it limit the scope of its preemption to that which is necessary to correct such inconsistency. Crown Castle’s position is predicated on its belief that the Agreement, as it applies to development of wireless communications infrastructure, is not sufficiently certain to be held in contravention of Section 253, and that it is practical and necessary, from a public policy standpoint, for the Commission to segment its regulatory treatment of agreements for exclusive physical access to state rights-of-way for the development of fiber optic and wireless communications facilities. In the event of a limited exercise of preemption, Crown Castle thus further urges the Commission to avoid overbroad pronouncements that agreements affording exclusive physical access for development of wireless communications infrastructure are inconsistent with Section 253, by either: (1) actively distinguishing between agreements affording exclusive physical access for development of fiber optic infrastructure and wireless communications infrastructure; or (2) at least expressly limiting its preemption to the problematic aspects of the Agreement respecting physical access for development of fiber optic infrastructure.

³ P.L. 104-104, 110 Stat. 56 (1996) (the “Telecommunications Act”), codified in relevant part at 47 U.S.C. Section 253(a), (b) and (c).

⁴ Petition of the State of Minnesota, Acting by and Through the Minnesota Department of Transportation and the Minnesota Department of Administration, for a Declaratory Ruling Regarding the Effect of Sections 253(a), (b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-way, *Petition for Declaratory Rulemaking*, dated December 30, 1997, filed January 5, 1998 (“Petition”).

II. The Agreement Is Consistent with Section 253.

Crown Castle reiterates its support for the State's position that states have the right to protect the safety of the traveling public and workers, and manage their rights-of-way. Numerous other state agencies commenting on the Petition assert parallel interests in, variously, the public safety of motorists and state personnel; minimizing costs incurred due to traffic congestion caused by utility operation and maintenance in rights-of-way; and development of ITS networks.⁵

The chief criticism of the Agreement appears to arise from the provision affording the Developer exclusive physical access for the development of fiber optic facilities. Although some commenters offer theoretical alternatives to the exclusive physical access which the Agreement entails, none of those options would obviate the conditions of perpetual construction/reconstruction that the State is seeking to avoid by affording sole physical access to a single party.⁶ Such commenters suggest, in effect, that states must afford physical access to all applicants if they afford physical access to any. Under the proffered theoretical alternatives, the State would be left with the barren practical choice of either allowing essentially unlimited physical access by all comers, present and future (thus guaranteeing a perpetual state of construction/reconstruction on its highways), or continuing its past policy of denying all parties the use of these efficient rights-of-way.⁷

⁵ See, e.g., Comments of the Alaska Department of Transportation and Public Facilities; the Arizona Department of Transportation; the California Department of Transportation; the Florida Department of Transportation; the Kansas Department of Transportation; the Kentucky Transportation Cabinet; the Massachusetts Highway Department; the Missouri Department of Transportation; the Montana Departments of Administration and Transportation; the New Mexico State Highway and Transportation Department; the New York State Thruway Authority; the North Dakota Department of Transportation; the Oregon Department of Transportation; the Tennessee Department of Transportation; the Texas Department of Transportation; the Vermont Agency of Transportation; the Virginia Department of Transportation; the Washington State Department of Transportation; and the Wisconsin Departments of Administration and Transportation.

Crown Castle notes that state actions initiating statewide ITS networks further state compliance with the federal mandate requiring cooperation in implementing a nationwide ITS network.

⁶ See, e.g., Comments of Ameritech Corporation at 4-5.

⁷ Not surprisingly, nearly all commenters opposing the Agreement are incumbent service providers or representatives of incumbent service providers.

III. If the Commission Acts to Preempt, It Must Do So Narrowly.

Should the Commission determine that the Agreement is in any part or degree inconsistent with Section 253(a), (b) or (c), Crown Castle strongly urges the Commission to adhere closely to the requirement of Section 253(d) that:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement *to the extent necessary to correct such violation or inconsistency*.⁸

Section 253(d) imposes upon the Commission an obligation to limit the scope of its preemption to that which is necessary to correct such inconsistency. Should the Commission preempt any portion of the Agreement, it should closely adhere to Section 253(d) by describing its preemption narrowly to apply only to those aspects of the Agreement that contravene Section 253 (a) and (b).

IV. Preemption of the Entire Agreement Would Be Premature.

Access for development of wireless facilities is fundamentally different from exclusive physical access for development of fiber optic facilities. Crown Castle notes that the Agreement contains a right on the part of the Developer to engage the State in negotiations for a modification to the Agreement providing the Developer rights of access for the purpose of designing, permitting, siting, installing, leasing, licensing, managing, operating and providing use to others of wireless communications facilities.⁹ It is not clear whether that provision contemplates exclusive physical access for development of wireless communications facilities. Nor does it presently seem to be public knowledge

⁸ 47 U.S.C. Section 253(d) (emphasis added).

⁹ See Agreement, Section 11.7 ("Right of Negotiation for Wireless Facilities").

whether the State and the Developer have in fact engaged in negotiations or reached agreement on amendment of the Agreement to allow access for development of wireless communications facilities, or if so, on what terms.

The lack of reasonably certain terms and conditions makes determinations of law with respect to development of wireless communications facilities highly speculative. For example, while development of the fiber optic facilities would entail the Developer's provision of wholesale fiber optic transport capacity (this supposed "telecommunications service" being a key criticism for several commenters¹⁰), the development of wireless communications facilities contemplated for negotiation under the Agreement probably would not entail the provision of telecommunications services -- wholesale, retail, or otherwise. Rather, such development would probably consist of placement of wireless communications towers, which would be available for essentially unlimited colocation of transmission equipment belonging to multiple carriers.¹¹ Unlike fiber optic services, for which a single or a few types of colocated plant can serve essentially all transmission needs, different types of wireless communications services require different transmitters. Because of the variety of transmission media required for different types of wireless communications service, the Developer would probably not itself take a telecommunications service role, and would thus probably not provide a "telecommunications service" within the meaning of Section 253 (i.e., it is doubtful that the Developer would serve as a "carrier's carrier" of wireless communications services).

Given the present lack of certainty in terms and conditions associated with development of wireless communications facilities, any Commission pronouncement on the consistency with Section 253 of a prospective amendment to the Agreement respecting development of wireless communications facilities would be premature. Moreover, failure to articulate the bounds of any preemptive action, as limited to the

¹⁰ See, e.g., *Comments of Midwest Wireless Communications, L.L.C.* at 2-5 (contending that the provision of wholesale "lit" and "dark" fiber optic transport capacity does involve "telecommunications service" within the meaning of Section 253(a)).

¹¹ Crown Castle notes that wireless communications towers do not suffer the problems of physical access for supplementation of plant that buried fiber optic cables entail.

present terms of the Agreement respecting exclusive physical access for fiber optic infrastructure, would cast a regulatory shadow on private access to state rights-of-way. As noted by the State in its request for expedited review, questions as to the conformity of the Agreement with Section 253 presently serve as a barrier to every aspect of its implementation,¹² and would thus substantially impair the development of wireless facilities serving the highway traffic corridors under the Agreement or any similar regime.

V. Overbroad Pronouncements Touching on the Efficacy of Agreements for Exclusive Access for Development of Wireless Communications Infrastructure Would Discourage the Development of Siting Policies.

Crown Castle also urges the Commission to avoid overbroad pronouncements on uses of rights-of-way for fiber optic infrastructure that would have unforeseen detrimental effects on federal, state, and local policies regarding development of wireless communications infrastructure. The rights of state and local governments to impose conditions on the construction and location of wireless communications facilities under Section 704 of the Telecommunications Act¹³ have been and continue to be matters of intense public debate,¹⁴ litigation,¹⁵ and Commission deliberation.¹⁶ A common policy of

¹² See Petition at 5 (“Because of the importance of this issue to the project, the Developer is unlikely to attract the investment necessary prior to Commission review.”).

¹³ Codified at 47 U.S.C. Section 332(c)(7).

¹⁴ See, e.g., “It’s a Control Thing: Vermont vs. Cell Phone Towers,” *New York Times*, March 11, 1998, p. A-12.

¹⁵ See, e.g., *AT&T Wireless Services of Florida, Inc. v. Orange County*, No. 96-1325CIVORL3ABF18, 1997 WL 718801 (U.S. Dist. Ct., M.D.Fla. 1997); *Sprint Spectrum, L.P. v. Zoning Hearing Bd. of Nottingham Township*, No. CIV. A. 97-1837, 1997 WL 688816 (U.S. Dist. Ct., E.D.Pa 1997); *Sprint Spectrum, L.P. v. Town of Farmington*, No. 3:97 CV 863(GLG), 1997 WL 631104 (U.S. Dist.Ct., D.Conn. 1997); *Westel-Milwaukee Co., Inc. v. Walworth County*, 556 N.W.2d 107 (Ct.App.Wisc. 1996).

¹⁶ See, e.g., Cellular Telecommunications Industry Association *Petition for Declaratory Ruling Seeking Federal Preemption of Moratoria Regulations Imposed by State and Local Governments on Siting of Telecommunications Facilities*, filed December 16, 1996; *Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities*, MM Docket No. 97-182, *Notice of Proposed Rule Making*, FCC 97-296 (rel. August 19, 1997).

numerous state and local governments is encouragement of colocation of wireless communications equipment in multi-tenant tower facilities in order to avoid unnecessary proliferation of towers. Failure to carefully distinguish between access for development of fiber optic and wireless communications infrastructures would almost certainly impair development of state and local policies favoring colocation of wireless communications facilities.

The FCC Local and State Government Advisory Committee has issued a policy statement on state and local rights-of-way, advising that:

Rights-of-way disputes between telecommunications companies and local governments should be resolved in local jurisdiction. *The FCC should avoid adopting broad policy statements or decisions that implicate other matters of state and local interests . . . without first having full and complete dialogue with the Committee.*¹⁷

Crown Castle respectfully submits that siting of wireless telecommunications towers is one of the “other matters of state and local interests” that the FCC Local and State Government Advisory Committee feared might be detrimentally implicated in broad Commission policy statements and decisions on rights-of-way disputes.

VI. Conclusion.

The Commission should act expeditiously to rule that the Agreement is consistent with Section 253. However, in the event that the Commission determines that it must preempt some aspects of the Agreement, it must do so narrowly and, moreover, should for public policy reasons carefully distinguish between exclusive access for development of fiber optic infrastructure and wireless communications infrastructure. Fiber optic cable and wireless communications development are simply different animals, and the Commission should not equate access for one with access for the other. A pronouncement that fails to distinguish between access for fiber optic infrastructure and

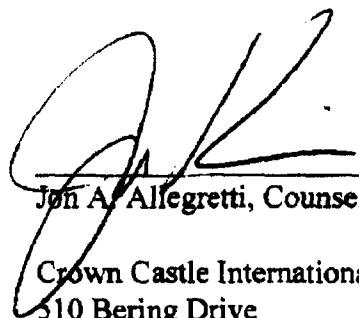
¹⁷ “Policy Statement on State and Local Rights-of-way and Telecommunications Service Competition,” Advisory Recommendation Number 1 of the FCC Local and State Government Advisory Committee, June 27, 1997 (emphasis added).

access for wireless communications infrastructure would almost certainly have an unforeseeable ripple effect on nationwide efforts to arrive at reasonable accommodations of federal, state, local, and private interests in wireless facility development.

Crown Castle thus strongly urges the Commission to carefully articulate any preemption decision with respect to this particular Agreement, and to specifically exclude from any preemption determination both the provisions of the Agreement regarding wireless communications facilities and the more general issue of the efficacy of agreements for exclusive access to state rights-of-way for development of wireless communications facilities.

Respectfully submitted,

By:

A handwritten signature in black ink, appearing to be 'Jon A. Allegretti', is written over a horizontal line.

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